

# THE SPOKESMAN-REVIEW

June 19, 2011

## Guest opinion: Washington's high court deals blow to racial bias

Jason A. Gillmer  
Special to The Spokesman-Review

On June 9, the Washington state Supreme Court issued an important decision involving race and the criminal justice system. The case, *State v. Monday*, involved a prosecutor's attempt to undermine the credibility of witnesses by appealing to unfounded racial assumptions about African-Americans.

The prosecutor got what he wanted: the jury convicted Kevin Monday of first-degree murder. But, in a holding that sends a powerful message about the importance of a fair trial, the court reversed Monday's conviction and sent the case back to be retried.

The prosecutor's case against Monday stemmed from a shooting in Pioneer Square in Seattle. During the trial, the prosecutor found himself facing witnesses who refused, for whatever reason, to provide the type of testimony he hoped to have. He therefore went after them using the oldest trick in the book, insisting they couldn't be trusted because of their race.

He told the jury that the witnesses were adhering to a "code" which holds that "black folk don't testify against black folk," as if this "code" was an inherent racial trait unique to people of color. He also accounted for the failure for any to come forward by insisting that blacks "don't snitch to the police." That this "no snitching" rule is broad-based and has nothing to do with race was of little moment. His message was clear: These witnesses, like black people in general, were not credible.

Sadly, prosecutors engaging in cheap racial tricks is nothing new. In 1935, a prosecutor banked on unfounded racial assumptions in a case against a Chinese-American named Charles Sang, who was accused of lying about his role in a gambling operation. In his closing arguments, like here, the prosecutor spoke to the credibility of the witnesses: "But I do say this: you can take into consideration the Chinese traits. The Chinese are natural gamblers; no question about that. It is a trait." Also like here, the court saw through the prosecutor's antics and reversed the conviction.

What makes Monday's case remarkable, however, is the force behind the court's condemnation of the prosecutor's actions. In an opinion by Justice Tom Chambers, the court rejected the traditional "harmless error" standard for reviewing misconduct and replaced it with a much more rigorous one. As the court put it, "resorting to racist

arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system” that such action demands reversal unless the state can prove “beyond a reasonable doubt that the misconduct did not affect the jury’s verdict.”

Chief Justice Barbara Madsen, in a concurring opinion, would have gone further. She wrote that “the injection of insidious discrimination ... is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.”

Undoubtedly, some objected in Sang’s case, as they will today, that reversing the conviction because of misconduct benefits the defendant at the expense of the victim. But such complaints miss the mark. The decision in Monday’s case is not about coddling criminals; it is about ensuring that people are treated fairly in our criminal justice system – something that, unfortunately, has not always been the case for racial minorities.

Indeed, through a broad coalition, the Washington Task Force on Race and the Criminal Justice System has begun to study the role of bias in our justice system. And what the task force has found has been eye-opening: Blacks in particular are six-and-a-half times more likely than whites to be in our prisons.

Confronted with such numbers, the ill-informed often resort to the tactics the prosecutor did in Monday’s case, relying on racist stereotypes to insist that there is something innate that causes people of color to commit crimes. But the task force has found differently, concluding that there are institutional arrangements that disadvantage minorities at every stage of the criminal justice system, including decisions about what crimes to target and what sentences to impose. These decisions may not result from a conscious decision to discriminate; nonetheless, they unfairly affect minorities for reasons unrelated to public safety.

Eradicating racial bias in our criminal justice system is not going to be easy and will not happen overnight. But the court’s decision in State v. Monday is a courageous step in the right direction.

*Professor Jason A. Gillmer is the John J. Hemmingson Chair in Civil Liberties at Gonzaga University School of Law.*

**Get more news and information at [Spokesman.com](http://Spokesman.com)**